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ARKANSAS COURT OF APPEALS

DIVISION I

No. CA09-21

JEFF NIX, ANGELA NIX, & DAPHNE
McGREGOR

APPELLANTS

V.

SIDNEY R. OWEN & LELA ANN OWEN
APPELLEES

Opinion Delivered November 11, 2009

APPEAL FROM THE LINCOLN
COUNTY CIRCUIT COURT
[LCV-2004-026-2-5]

HONORABLE JODI RAINES DENNIS,
JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

This is a boundary dispute, which arose in 2003 between appellees, Sidney and Lela Ann Owen, and appellants Jeff and Angela Nix. Appellant Daphne McGregor is Angela Nix’s grandmother. At issue are 3.24 rural acres. Appellees filed a quiet-title action, relying upon a 1973 warranty deed conveying the property to them. Appellants countered by arguing that they had acquired the disputed property by adverse possession. At the first trial, the court granted a directed verdict in favor of appellees, concluding that the Nixes had not established adverse possession. The Nixes appealed to this court; we reversed and remanded, ruling that although the trial court was correct in finding that the Nixes failed to prove that they intended to hold the property adversely for the required statutory period of time, “the trial court failed to analyze the Nixes’ argument that Joe McGregor [a predecessor in title]

had adversely possessed the land and then deeded it to them.” Following the hearing after remand, the trial court again found in favor of appellees. The matter is before us once more. As their sole point of appeal, appellants contend that the trial court was clearly erroneous in ruling that they did not meet their burden of proof to establish adverse possession by Joe McGregor. We disagree and affirm.

In 1950, the 3.24-acre tract was conveyed to Ross McGregor by his brother, Joe McGregor, and Joe’s wife, appellant Daphne McGregor. The 3.24-acre tract was conveyed as part of a larger tract. The brothers were on good terms; Joe continued to occupy the property; and Ross used part of it for his garden. Following the conveyance, the tax assessor’s office correctly added the property to Ross McGregor’s tax statement, but mistakenly failed to subtract the parcel from Joe and Daphne McGregor’s tax statement. Consequently, both parties paid taxes on the disputed acreage, unaware of the duplication.

In 1973, Ross McGregor deeded the property (as part of a larger conveyance) to appellees, Sidney and Lela Ann Owen. The assessor’s office correctly transferred the 3.24-acre tract to appellees’ tax statement, but continued to tax Joe McGregor, *i.e.*, continuing to “double-tax” the property. Sidney Owen testified that he allowed Joe to continue to garden on the 3.24-acre tract. In 1993, appellees had the property surveyed, and survey stakes were placed upon the property line that subsequently became disputed. According to Sidney Owen, Joe was aware of the survey and “had no problem with it.”

In 1991, Joe and Daphne McGregor deeded lands north of the 3.24-acre tract to their granddaughter, Angela Nix; she is married to Jeff Nix. Angela and Jeff believed that the 3.24-acre tract belonged to her grandparents. After Joe died in 2002, the property-line dispute at the root of this lawsuit arose when appellant Jeff Nix, in late 2003, constructed a fence on the 3.24-acre tract. In 2004, Daphne McGregor “conveyed” her interest in the property to Angela Nix.

Although this court reviews equity cases *de novo* on the record, we do not reverse unless we determine that the trial court’s findings of fact were clearly erroneous. *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004). In reviewing a trial court’s findings of fact, we give due deference to the trial court’s superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Id.* In order to prove ownership of land by adverse possession, the party claiming possession must show continuous possession of the property for seven years. *Id.* In addition, that possession must be visible, notorious, continuous, hostile, exclusive, and accompanied by an intent to hold against the true owner. *Id.* Also, because the use of land by family members is presumed to be permissive, stronger evidence of adverse possession is required in cases involving family. *Id.* If the original use and possession of the land is permissive, it cannot become adverse until notice of the hostility of the possessor’s holding has been brought home to the owner by actual notice or by a holding so open and notorious as to raise a presumption of notice equivalent to actual notice; the evidence of adverse holding when the original entry

is by permission must be very clear. *Rickett v. O'Dell*, 86 Ark. App. 86, 160 S.W.3d 717 (2004).

In its September 15, 2008 order quieting title in appellees following remand, the trial court explained:

To prove adverse possession, a claimant must prove actual, open, hostile, notorious, exclusive possession with the intent to hold against the owner, prove color of title and payment of taxes for a period in excess of seven years. In order to satisfy the seven (7) year time requirement for adverse possession, the defendants rely upon the time period that Joe McGregor had a garden on a portion of the property. Testimony from Mr. Owen was that Joe McGregor's use of the property for a garden was permissive. He testified that they were friends and that Mr. McGregor had borrowed tractor implements from him in order to cultivate the garden.

From the evidence and testimony, the Court finds that Mr. Joe McGregor's use of the property was permissive. There was no proof that Mr. McGregor exercised hostile, notorious, exclusive possession of the property with the intent to hold against the owner. The only testimony concerning a possible problem was that the survey stakes were removed by Mr. McGregor.

The Court finds it illogical that Mr. Joe McGregor would deed this property to Mr. Sid Owen, then intend to adversely hold the property against the person to whom he had sold the property.

The defendants have not met their burden of proof, and their counterclaim is denied.

There was really never any question that the Nixes could not independently establish adverse possession of the property in question — a conclusion our court designated as “correct” in the first appeal. Moreover, the trial court found that Joe McGregor's continued use of the property in question, following his conveyance of it to his brother Ross, was permissive — especially in light of the fact that they were brothers and they were on good

terms with each other. Furthermore, once Ross McGregor conveyed the property to the Owens in 1973, Sidney Owen testified that Joe's continued use of the property for his garden was with their permission. He also testified that Joe had no objection to the results of the survey of the property. Finally, after the Owens purchased the property from Ross in 1973, the tax records reflected the purchase by adding the parcel to the Owens' tax statement, even though the assessor mistakenly continued to tax Joe. We find no error in the trial court's findings of fact and conclusions of law.

Affirmed.

PITTMAN and HART, JJ., agree.